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Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~311~~ 2

WILLIAM SCHNEIDERMAN

Petitioner

against

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1941

No. .

WILLIAM SCHNEIDERMAN

Petitioner

against

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Your petitioner, William Schneiderman, respectfully alleges:

A

Summary Statement of the Matter Involved

Petitioner came to this country in 1908 when he was three years old. He has lived here ever since. When he was twenty-one he was naturalized. Thirteen years later, in 1940, his naturalization was revoked because the Court found that it had been (a) fraudulently and illegally procured in that petitioner's oath that he would support the Constitution and that he renounced allegiance to foreign sovereignties was a false oath; (b) fraudulently procured

because petitioner concealed from the naturalization court that he was a member of the Communist Party; (c) illegally procured in that he was not, and had not within five years preceding the filing of his application, behaved as a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.

These findings were all based upon the Court's conclusions as to the tenets of the Communist Party and of petitioner's attachment to the tenets because of his membership in that party. The views that the Court attributed to the petitioner were not his views. The record discloses that different interpretations are held as to the tenets of the Communist Party. The Court selected one set of these interpretations and attributed them to petitioner, and because of this attribution found that petitioner must have held the views which petitioner has disavowed; and after imputing such views to petitioner the Court on the basis of his holding the views thus attributed to him his grant of citizenship should be cancelled.

The judgment of cancellation was handed down by the District Court of the United States for the Northern District of California, Southern Division; Michael J. Roche, Judge presiding, on July 23, 1940. The Ninth Circuit Court of Appeals affirmed the judgment on April 28, 1941. The mandate was stayed on May 16, 1941.

B

Jurisdiction

The judgment cancelling petitioner's citizenship was based upon the Act of June 29, 1906 (8 U. S. C. § 405). This Court's jurisdiction rests on § *240* (*a*) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. § 347).

C

Questions Presented and Reasons Relied on for the Allowance of the Writ

1. The statute, as construed by the courts below, permits the setting aside of the thirteen year old citizenship of one who has spent all but the three earliest years of his life in the United States because of the Courts' conclusion that petitioner must, in 1927, have held certain abstract political ideas the effect of which he misstated to or concealed from the naturalization court. Citizenship may be cancelled only for fraud or illegality. Neither fraud nor illegality can be predicated upon the imputation of political views to a person where the views are imputed solely because of his membership in a political party, as to the doctrines of which there are varying possible interpretations, especially where petitioner disavows the interpretations imputed to him by the Court.

2. The decision of the Court below—attributing to an individual political beliefs solely because of that person's membership in a political party, adjudging him guilty of false swearing and fraudulent misrepresentation because of such putative political beliefs, and cancelling his citizenship for the alleged fraud—creates a precedent which makes provisional the tenure and status of naturalized citizens, and subjects their citizenship to revocation years after the granting thereof because of attributed political beliefs. Such a rule is in conflict with the principles of construction that this Court has laid down in cases like the *Maxwell Land-Grant Case*, 121 U. S. 325, as construed in connection with *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 105.

3. The decision of the court below, in effect, amounts to the setting of standards for citizenship by the Court instead

of by Congress; and it actually establishes a rule of naturalization which Congress deliberately refused to enact.

4. When, in 1927, an applicant for citizenship has fully complied with the statutory requirements, has informed the naturalization court as to all the matters inquired of him, and the naturalization court in compliance with the statute thereupon grants citizenship, from which no appeal is taken by the Government, a court cannot in a cancellation proceeding in 1940 cancel citizenship by substituting its view as to the attachment of the applicant to the Constitution of the United States for that of the naturalization court.

5. Political beliefs and membership in a party (which is not proscribed by Congress) which were not inquired into by the court granting naturalization, cannot be the basis for a finding that the appellant was guilty of a false and fraudulent concealment and that his citizenship should be cancelled on the ground of fraud.

6. The decision of the Court deprives the petitioner of a valuable right. There is a complete absence of evidence that there was any imposition upon the naturalization court, for there was no evidence that petitioner held the abstract beliefs which the Court now holds he must have held and therefore must have misrepresented or concealed.

7. The findings—that petitioner's oath was false, that he fraudulently concealed his membership in the Communist Party, that he had not behaved as a person attached to the Constitution—are all based upon the assumption that petitioner held as political beliefs those which the Court attributed to him because of his membership in the Communist Party. There is no foundation in the evidence for these findings; and the Court in attributing to the petitioner the beliefs that it finds were misrepresented or con-

cealed from the naturalization court, did not make a judgment of fact, but imposed its own beliefs as to the Communist Party's tenets on petitioner. The Court in so deciding worked a forfeiture of petitioner's liberty and property without due process of law.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Ninth Circuit in the case therein entitled "United States of America against William Schneiderman, also known as Velvel Schneiderman"; and that said case may be reviewed and determined by this Court and the decision therein finally revised; and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem appropriate.

Respectfully submitted

WILLIAM SCHNEIDERMAN
By CAROL KING
Attorney

Dated: July 26, 1941

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit is reported at 119 F. 2d 500. It appears in the record at page 908. The opinion of the District Court is reported in 33 F. Supp. 510.

II

Jurisdiction

1. The statutory provision is Jud. Code § 240(a) (28 U. S. C. § 347) as amended by the Act of February 13, 1925, 43 Stat. 938.

2. The date of the order for mandate was April 28, 1941.

III

Abstract of the Case

Petitioner came to this country a child of three (R. 74). At eighteen he declared his intention to become a citizen (R 72). His petition for naturalization was filed shortly after his twenty-first birthday (R. 78) and granted a few months later (R. 79). Twelve years after the granting of citizenship the Government brought these proceedings to cancel the citizenship of petitioner, who had then lived thirty-one of the thirty-three years of his life in this country (R. 10).

The Statute

The proceeding was brought under the Act of June 29, 1906, 8 U. S. C. § 405, which provides for instituting proceedings "for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."

The Findings

Cancellation was decreed because the Court, in 1940, inferred from petitioner's membership in the Communist Party and the Court's construction of the tenets of that party, that he had, in 1927, misrepresented or concealed his political ideas in the naturalization proceeding. It accordingly found that his certificate of naturalization (a) was fraudulently and illegally procured in 1927 in that petitioner's oath that he would support the Constitution and that he renounced allegiance to foreign sovereignties, was a false oath (Seventh Finding, R. 51); (b) was fraudulently procured because petitioner concealed from the naturalization court that he was a member of the Communist Party (Sixth Finding, R. 50); (c) was illegally procured in that he was not, and had not within five years preceding the filing of his application behaved as, a person attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same (Fourth Finding, R. 48).

The Court specifically found in these three findings (Fourth, Sixth, and Seventh) that the party to which petitioner belonged, was opposed to the principles of the Constitution of the United States and advised, advocated, and taught the overthrow of the government of the United States by force and violence; in two of the findings—the concealment finding (Sixth) and the behavior finding

(Fourth)—it added that the Communist Party taught "disbelief in, and opposition to, organized government" (R. 49, 51).

The Evidence

Petitioner had all the jurisdictional qualifications for citizenship. The findings rested solely on his imputed holding of certain abstract political beliefs. These beliefs were not attributed to him because of anything that he said, wrote, or did, they were deduced solely from the fact that the petitioner was a member of and had participated in the activities of the Communist Party and its predecessors, and from the Court's interpretation of the tenets of the Communist Party. Except for the inferences drawn from petitioner's membership and the Court's selection of one set of interpretations of the doctrine rather than another, there is no evidence that petitioner held or advocated any of the doctrines now attributed to him by the Court. On the contrary, petitioner swore that he was attached to the Constitution (R. 896); that he would fight for this country against all other lands including the land of his birth (R. 886-7). Apart from the ideas that are imputed to him there is nothing to show that he did not have a deep concern for the country of his adoption or that he lacked attachment to the Constitution or that he believed in, or that he thought that the Communist Party advocated, the overthrow of the Government by force and violence. The affirmative evidence is all the other way (R. 362, 373). He did wish to see change and improvement in social conditions (R. 862, 898) and thought and hoped that they might be accomplished by representative and peaceful processes (R. 867-8, 897-8). Membership in the Communist Party, he believed, was not incompatible with the obligations of American citizenship (R. 395).[1] To

[1] "Nothing in our Constitution or our laws forbids the formation of such a party (the Communist Party), or persons from joining them." *Strecker v. Kessler*, 95 F. 2d 976, 978.

the contrary, he believed that "our program, principles and tactics, our theory and practice, are perfectly consistent with the obligations and rights of American citizenship" (R. 359). Petitioner gave a reasoned statement of these things (R. 362, et seq.). He adduced in support of those views statements of authorities who he contended interpreted Communist doctrine the way he did (R. 397, et seq.).

The evidence established that petitioner had lived a thoroughly reputable life (R. 357); had never been convicted of any crime (R. 360) or been in any conflict with the criminal authorities (R. 360). There was no suggestion that he had advocated or was guilty of any sabotage or any subversive activities.

The Court discarded petitioner's assertions of his opinions and beliefs and disregarded the writings and statements of authorities on party doctrine that he adduced in support of his beliefs. The Court then attributed to him the interpretation that it chose from the admittedly differing interpretations of the Communist Party doctrine, and because of the point of view thus attributed to petitioner the Court concluded that he was guilty of fraud, false swearing, and concealment in not declaring the attributed beliefs as his own to the naturalization court.

IV

Errors relied on and summary of arguments specified as grounds of appeal.

The grave dangers to naturalized and native citizens alike in the decision appealed from, require review by certiorari.

1. The judgment below has forfeited petitioner's thirteen year old citizenship upon the Court's attribution

to the petitioner of political opinion which it imputes to him, not because of anything that he has said or done, but solely on the Court's choice of one rather than another set of interpretations of Communist Party doctrine. In effect, the Court has ruled that the naturalization of a citizen may be revoked solely because of membership in the Communist Party, thus laying down a rule of naturalization which is not only beyond its powers but is one that Congress deliberately refused to establish.

The judgment below, instead of resting upon proof of the fraudulent misstatement by petitioner of his political beliefs, to the naturalization court, substitutes the original point of view of the court sitting in a cancellation proceeding and does this solely by attributing to petitioner the Court's version of the political tenets of the Communist Party.

The doctrines implicit in the decision below, that the tenure and status of a naturalized citizen are provisional and that they may be cancelled by attributing to him, years after the event, a frame of mind deduced from the tenets of a political party (which is not proscribed) flout our American traditions, and are gravely menacing to the hosts of naturalized citizens.

2. The finding that petitioner took a false oath has no support in the record. But the conclusion that a constitutional oath may be found to be false years after it was taken, on the ground that it was inconsistent with abstract beliefs that may later be attributed to an affiant by persons who disagree with him, is dangerous to all citizens, native and naturalized alike, who may have taken a constitutional oath.

3. The holding that there was a concealment because petitioner did not disclose his membership in the Communist Party concerning which he was not questioned and which he could not have believed to be material, contravenes the rules of law that may hereafter be obtained relat-

ing to the cancellation of grants because of fraud or misrepresentation.

4. The finding that petitioner, a man of irreproachable life, may have his life-long citizenship cancelled on the ground that his behavior shows lack of attachment to the principles of the Constitution, rests upon no support except the views attributed to him in the revocation court.

The doctrine of the court below permits the uprooting of a man and his family without any limitation of time, and without any proof of fraud or illegality, except such as may be imputed to him from the holding of beliefs and the appraisal of such beliefs as un-American.

These questions were all raised in the court below in the specified grounds of appeal (R. 57, 58).

POINTS

FIRST

The judgment of the Court has set aside petitioner's thirteen year old citizenship upon the Court's attribution to the petitioner of political opinions. It imputes these opinions not because of anything that petitioner has said or done, but solely on the Court's choice of one rather than another set of interpretations of Communist Party doctrine. In effect, the Court has ruled that the naturalization of citizens may be cancelled because of membership in the Communist Party, thus laying down a rule of naturalization which is not only beyond its powers but is one which Congress deliberately refused to enact.

This is not an original naturalization proceeding. Before a naturalization court the alien must show to the satisfaction of the court "that he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well-disposed to the good order and happiness of the same" (Act of June 29, 1906; 8 U. S. C. 382). In a naturalization court the bi-

ness of the applicant is tested against the climate of opinion then in existence. If the Government is not satisfied with the discretion then exercised by the naturalization court it may appeal.

But when the jurisdictional requirements of naturalization have been met and citizenship has been granted and, years later, it is sought to annul that grant on the ground that beliefs were misrepresented years before, the issues presented are very different. Then the statutory provisions—read in the light of the doctrines safeguarding vested rights and freedom of belief—require proof that the citizen fraudulently misstated or fraudulently concealed his beliefs. There is no foundation in the record to charge the petitioner with holding the beliefs found to exist—much less their fraudulent misstatement: for there is affirmative evidence that they were not his beliefs; and all that is shown to the contrary is that he was a member of a party whose tenets were subject to varying interpretations and the court selected one version of those tenets rather than another and attributed to the petitioner the version so selected.[2]

The opportunities that such a doctrine afford to proscribe for political views a person whose activities subsequent to his naturalization may find disfavor, require an emphatic and definitive rejection of the decision below.

1. There is no rule of law making membership in the Communist Party, as such, ground for deportation or ex-

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[2]The Circuit Court of Appeals stated that the principles of the Communist Party, to which appellant admittedly adhered, *may* have been such that it was *highly improbable, if not impossible,* for appellant's testimony as to his beliefs to be true (R. 916).

> "* * * In bringing these aims about we find sharply conflicting views as to what method the Communist Party advocates. There is substantial evidence that the Communist Party expects to use and advocates overthrow of our government by force and violence. There is other evidence to support the view that such party neither contemplates nor advocates the use of force and violence in the overthrow of our government * * *" (R. 917).

clusion from citizenship. On the contrary, bills to accomplish this were introduced in Congress but they were not enacted.[3] But the principle that Congress rejected has, in effect, been applied and extended by the Court below. Applied, in that the Court has decreed that a man is not entitled to citizenship because of conclusions deduced solely from his membership in the Communist Party. Extended, in that the decision below goes far beyond exclusion of an alien: it holds that a man's vested rights of citizenship may be divested, and his life—which was entirely (except for a few years of infancy) lived in this country—uprooted, because of inferences which the Court has drawn from his membership in a political party.

2. If a judgment granting one of the most precious of human rights[4] is to be set aside this can be done only on evidence clear, compelling, and convincing; it may not rest upon the assumption that petitioner's interpretations of party doctrine should have been the same as that of the Court.

(a) In an ordinary commercial case to set aside a grant, fraud must be proved by evidence clear, unequivocal and convincing. (*Maxwell Land-Grant Case*, 121 U. S. 325, 381).[5] If that is the principle governing the setting

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[3]H. R. 12044 (72d Cong., 1st sess.) passed House; reported by Senate Committee on Immigration on June 11, 1932. H. R. 7120 (74th Cong., 1st sess.) reported out of the House Committee on Immigration and Naturalization on May 27, 1935. Nothing further happened to either bill.

[4]The award of citizenship is a judgment. (*Tutun* v. *United States*, 270 U. S. 568, 577.) To deport one who claims to be a citizen deprives him of liberty and may result also in loss of both property and life, and of all that makes life worth living. (Mr. Justice Brandeis in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284.)

[5]Recent assertions of the rule are found in *Fidelity & Casualty Co.* v. *Genova*, 90 F. 2d 874, 876; *Marshall* v. *Gelfand*, 99 F. 2d 85, 86.

The principle has been applied to proceedings to cancel citizenship: "It must be borne in mind that these proceedings are to annul a solemn judicial

(*Footnote continued on next page*)

aside of ordinary commercial transactions, then said Mr. Justice Miller, "how much more should it be observed where the attempt is to annul the grants * * * of the United States" (*Maxwell Land-Grant Case, supra,* at 381). And when the grant that is sought to be annuled is a grant of citizenship and it is sought to be annulled, not on the basis of proof of objective facts but of political beliefs—especially beliefs not proscribed by Congress,—a qualitatively different standard applies.[6] For neither fraud nor illegality—the sole basis of a revocation proceeding—can be predicated upon the representation of abstract political beliefs,—particularly beliefs attributed to a person in spite of his disavowals in a case where there are varying interpretations of the party doctrines.

(b) For when proceedings are brought to deprive a person of liberty or property because of the false state-

(*Footnote continued from previous page.*)

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grant by the United States to defendant, and 'nothing will warrant cancellation of his grant of citizenship but clear, unequivocal, and convincing evidence, that in quantity and quality inspires confidence and produces conviction of the truth of the charge, virtually beyond reasonable doubt.' *U. S.* v. *Sharrock* (D. C.), 276 Fed. 30, 32 * * *" *United States* v. *Knight,* 291 F. 129, 134.

"Under existing law [where] an applicant for citizenship" complies with the requirements and receives a certificate of citizenship, "his citizenship cannot be cancelled or taken away from him, unless the Government is able to prove beyond a reasonable doubt that at the time he took the oath of allegiance he did not believe in this form of Government and in fact had a mental reservation." *Report of the Committee on Immigration and Naturalization on H. R. 9690,* 75th Congress, 3d sess. (1938) proposing changes in the law to obviate such restrictions.

[6]"This so-called statement of fact—which is alleged to be false—is merely a conclusion or a deduction from facts. True it is the kind of conclusion which courts call a conclusion of fact, as distinguished from a conclusion of law; and which is sometimes spoken of as a finding of ultimate fact as distinguished from an evidentiary fact. But, in its essence it is the expression of a judgment—like the statements of many so-called historical facts. To such conclusions and deductions the declaration of this court in *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 104, is applicable." Dissenting opinion of Brandeis and Holmes, JJ., in *Pierce* v. *United States,* 252 U. S. 239, 266, 267. (See reference to *American School of Magnetic Healing* v. *McAnnulty, infra,* footnote 7.)

ment of his beliefs or opinions (*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 105, 106),[7] more especially because of his political opinions (*Pierce* v. *United States*, 252 U. S. 239, dissenting opinion of Brandeis and Holmes, JJ., 268, 269),[8] the courts recognize that political beliefs are not like allegations of fact or even like opinions as to the quality of cloth or the tensile strength of steel, for political beliefs are complicated matters and the denial of the right to think as one pleases not lightly to be imposed. The nature of these beliefs is such that they may not be imputed when the result of the imputation is to deprive a man of liberty or property, by attributing to him, against affirmative evidence to the contrary, one rather than another, version of the tenets of a political party.

(c) Even where political beliefs can be established beyond any possible doubt, it is contrary to our institutions to penalize a man for the mere holding of such beliefs.[9]

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[7] "Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practiced it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses", Peckham, J., in *American School of Magnetic Healing* v. *McAnnulty*, *supra*, at 106. "* * * There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practice upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false * * *" Same, at 107.

[8] "All the alleged false statements were an interpretation and discussion of public facts of public interest. * * * even the President's address, which set forth high moral grounds justifying our entry into the war, may not be accepted as establishing beyond a reasonable doubt that a statement ascribing a base motive was criminally false." *Pierce* v. *United States*, *supra*, at 269.

[9] "It is of the essence of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts." Memorial of Charles E. Hughes and others to the New York Assembly, January 21, 1920, in the case of the expulsion of assemblymen for membership in the Socialist Party.

Moreover even in cases where an individual *has admitted* the holding of beliefs, caution must be observed in imputing those beliefs as of an earlier date. For not only are different questions presented to a court sitting in a cancellation proceeding than in a naturalization proceeding, but the climate of opinion may change radically from one period to another[10] and beliefs calling for social or political changes that might be dismissed as negligible at one period might be viewed with great concern in another.[11] Accordingly, even when a court is dealing with *admitted* beliefs it should be reluctant when important rights are at stake to substitute its views as to the significance of those beliefs in the total picture when the question comes up years afterwards. (Compare *Rowoldt v. Perfetto*, 355 U. S. 115, 116.)

(11) The situation is considerably different when a court attempts to attribute to a man beliefs which he denies. For where a court selects one of several possible interpretations of doctrine—theological, poetic, or political—and then attributes its selection to a person who may not

[10] The increasing trend in opinion in the United States is shown in *Schneiderman v. United States*, 320 U. S. 118, 136. Since the *Schneiderman* case in 1943 immigration under the Second War Powers Act of October 6, 1942 as amended by the Act of June 28, 1944, 58 Stat. 746, 8 U. S. C. Supp. IV, 203 (b), 54 Stat. 673, 8 U. S. C. 203 (a) (27), and the Displaced Persons Act of June 25, 1948, 62 Stat. 1009, as amended by the Act of June 16, 1950, 64 Stat. 219, 50 U. S. C. App. Supp. 1951, 1951 (b) (1), have admitted into the country hundreds of thousands of persons who, according to the Government's own contentions, would have been excluded under the standards of the *Schneiderman* case. See Report of the Commissioner General of Immigration, Annual Report of the Immigration and Naturalization Service, 1951, pp. 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44,

well, as he insists, have chosen a different interpretation, the court is not making a judgment of fact, it is imposing its own belief. The case is particularly glaring when a court does this in so complex a matter as political doctrine.

For "there is no sure test of what a party does advocate. The utterances of a leader may represent only his personal view and be rejected by his associates. Even platforms have never been taken very seriously in any party." (Chafee on "Freedom of Speech" [1920] 261.)" To assign to a citizen one of the admittedly varying interpretations of party doctrine is, in the language of Holmes, C. J., "mere fating." (Schaefer v. Keesler, 75 F. 2d 975, 978.) To penalize him for holding the views so attributed is a clear deprivation of due process.

2. Yet as the evidence discloses, that is what was done in this case. The [illegible] [illegible] [illegible]

believed, leads to the conclusion that the Communist Party held and advocated that private ownership of the agents of production was wrong; that the agents of production should be confiscated by the government without compensation to the private owners thereof; that the government should be a dictatorship of the proletariat; that the present government here should be abandoned and one like that of the Soviet Union established; that the Supreme Court and the Senate should be abolished; that the government should be controlled by one political party only, and all others should be suppressed; and that the various countries of the world should establish a world union of Soviet Socialist Republics. It is obvious that these views are not those of our Constitution."

These views it deduced from the testimony of two ex-Communists and from certain books, pamphlets, and writings as to the tenets of the Communist Party. They were by no means, except by attribution from his membership, the views held by the petitioner. He believed in the ultimate social ownership of the means of production (R. 862). He stated that under certain circumstances if means of production were taken over there would have to be compensation (R. 878). He believed, and quoted authority for the view that "dictatorship of the proletariat" meant: "not a form of government but a state of things"; that when working men came to be in the majority they would influence the state more than monopoly capitalists would (R. 864). He believed there should be changes in the framework of the Government as a long range process (R. 898). He did not believe that national boundaries would ever disappear completely (R. 895). He did believe in the solidarity of labor throughout the world and cited Lincoln's statement in accord.[15] In support of his views

[15] "The strongest bond of human sympathy, outside of the family relation, should be one uniting all working people, of all nations, and tongues, and kindreds."—"Complete Works of Abraham Lincoln", Gettysburg Edition, Reply to New York Working Men's Association, March 21, 1864, Volume X, page 53 (R. 432).

he called attention to publications and statements of party leaders (R. 433, et seq.).

The Court characterizes the views quoted on the preceding page, which it selected as being the views of the Party, as "not those of our Constitution". But Americans whose patriotism the Court would not have questioned do not agree with the Court that the holding of the views quoted is un-American.[16]

Thus, Congressman Dies, reporting for the Committee on Immigration and Naturalization (H. R. No. 1353, 72d Congress, 1st sess. upon H. R. No. 12044) said: "The Committee has made it plain that the proposed bill will not affect any alien who merely subscribes to a doctrine which advocates a system based upon common ownership of property or abolition of private property unless such alien believes in, advises, or advocates the establishment of this system by force or violence."

Judge Tuttle could not "follow the government in its contention that belief by an alien that changes should be made in the form of our government indicates lack of attachment to the principles of our Constitution." (*United States* v. *Rovin*, 12 F. 2d 942, 944-945.)

"I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment." (Mr. Justice Brandeis in the concurring opinion of *Whitney* v. *California*, 274 U. S. 357, 379.)

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[16]What is "un-American" is itself subject to a great differences of opinion. Thus the following organizations have been listed as "un-American" by Congressman Thorkelson of Montana: The Survey Associates; the American Civil Liberties Union; the cooperative movement; the Committee for Industrial Organization; The Washington Friends of Spanish Democracy, with Leon Henderson, president, and William Leiserson and Rev. Kenneth Lyons; the Brookings Institution.

> "These are some of the groups that are connected with the so-called pink, red, and scarlet activities. Some of the Members of this House are also connected with some of these organizations * * *" (84 Cong. Record, 76th Congress, 1st Sess., p. 10384 [July 28, 1939]).

(b) The fact that the courts below differed from the views of Justice Brandeis, Judge Tuttle and Congressman Dies, does not show that either group was necessarily in error, but that there were certain possible differences of opinion. It does, however, make it unmistakable that petitioner's avowal, in 1927, of attachment to the principles of the Constitution cannot now be adjudicated to have been false.

(c) So far as belief in force and violence as a method of bringing about change is concerned, the question is not what the party tenet was—if there could be said to be absolutes as of any particular time—the question is whether the Government proved that petitioner had a different frame of mind in 1927 and misstated that frame of mind to the naturalization court. There was a complete failure of proof, for all that the record establishes is that different people had different ideas as to whether the Communist Party did or did not believe in the overthrow of the government of the United States by force and violence.

The court below found the views on this point "sharply conflicting" (R. 917). The District Court noted the divergence of courts on this point (R. 41). The conflict has been noted by other courts and commentators. Some courts have believed that judicial notice may be taken as to the attitude of the Party.[17] Others believe that it may not.[18] Some courts have believed that the Party doctrine did not involve a belief in force and violence.[19] Certiorari was sought in *Strecker* v. *Kessler* (*supra*, p. 8) because of

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[17] *United States ex rel. Vakinen* v. *Commissioner of Immigration*, 57 F. 2d 707 (C. C. A. 2d, 1932), cert. denied, 287 U. S. 607 (1932); *Ex parte Jurgans*, 17 F. 2d 507 (D. Minn. 1927), aff'd *Jurgans* v. *Seaman*, 25 F. 2d 35 (C. C. A. 8th, 1928); *Kjar* v. *Doak*, 61 F. 2d 566, 569 (C. C. A. 7th, 1932).

[18] *Ex parte Fierstein*, 41 F. 2d 53 (C. C. A. 9th, 1930); *Strecker* v. *Kessler*, *supra*, at 978.

[19] *Colyer* v. *Skeffington*, 265 F. 17, 61 (D. Mass., 1920), reversed on other grounds, *Skeffington* v. *Katzeff*, 277 F. 129 (C. C. A. 1st, 1922); *The King* v. *Hush; Ex parte Devanny* [1932], 48 C. L. R. 487, 516-518 (opinion of Mr. Justice Evatt of the High Court of Australia).

the differing attitudes of the courts.[20] Commentators totally unconnected with this case have expressed the view that the Communist Party does not support the doctrine of force and violence, among them, the two university professors whose testimony was read into the record on behalf of the petitioner (R. 477, 695).[21]

It is not to be admitted that hosts of naturalized citizens are to be placed in the kind of jeopardy which the decision appealed from would occasion. Our notions of freedom of speech and belief and of the security of tenure and status against unwarranted attacks preclude that the inestimable privileges of American citizenship should be held to the "hazard of successful resistance" of those who for motives of their own may, years later, when the entire perspective of opinion may have changed, bring about the destruction of a man's citizenship by substituting for beliefs which he avows beliefs that are selected for and attributed to him.

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[20]The Government's Petition for a Writ of Certiorari in the *Kessler* v. *Strecker* case states (p. 12):

> "The question whether membership by an alien in the Communist Party of America, together with the resulting affiliation with the Communist International, subjects an alien to deportation, was answered by the court below in the negative; as will be shown, other courts have given an affirmative answer. Moreover, the court below regarded the record as lacking in evidence to support a finding that these organizations, at the time of respondent's membership in 1932-1933, advocated or believed in the overthrow of the Government of the United States by force and violence; other courts have sustained orders of deportation on records containing essentially similar evidence."

[21]"Every party has such men [who would use force to ged rid of an opponent] * * *. The Republican Secretary of the State of Massachusetts would shoot Bolshevists and traitors every morning, at least in war time. * * * But such men do not turn their party into a party of force and violence." Chafee, *Freedom of Speech* (1920), pp. 260, 261. Edward C. Cheyney, prof. Emeritus, European History, Univ. of Pa., *American Academy of Political and Social Science, Annals*, Vol. 200, pp. 1-12 (Nov., 1938): "Merely to charge them [Communists] with planning to bring about a change in the Government of the United States 'by force and violence', a doubtful and frequently denied charge at best, is to surrender the traditional American way of argument to a propaganda of shadowy fear." See also: *Encyc. Brit.*, 12th ed. (1922), Vol. 30, p. 732; Harry F. Ward, *Democracy and Social Change*, Modern Age Books, Inc. (1940), p. 144.

SECOND

The finding that petitioner's naturalization oath was false is without support in the evidence.

Petitioner swore to support the Constitution and to renounce allegiance to any foreign prince, potentate, state, or sovereignty, and to support and defend the Constitution against all enemies, foreign and domestic. The oath was false, the Court found (R. 51), because he did not intend to renounce his allegiance, but on the contrary, to maintain allegiance to the Union of Soviet Socialist Republics and to the Third International; he did not intend to support the Constitution but intended to support the teachings of the Third International, which the court found are opposed to the principles of the Constitution and advocated the overthrow of the government and laws of the United States by force and violence (R. 51, 52).

1. The conclusion that petitioner did not intend to support the Constitution, but on the contrary, intended to maintain allegiance to the Union of Soviet Socialist Republics and to the Third International, overlooks the essential facts. Petitioner was a boy of three when he left Russia (R. 74, 75). When he became a citizen at the age of twenty-one he had lived all of his years of understanding in the United States (R. 75). Petitioner swore in the naturalization court that he was attached to the Constitution (R. 75); he testified in the court below that he would fight for this country even in a quarrel with Russia (R. 886, 887).

2. The alleged falsity of the petitioner's oath because of his holding of views that are opposed to the Constitution has already been discussed. But a word may be added concerning the dangers that this decision holds not only for naturalized but for native citizens. Millions of

Americans take the Constitutional oath—lawyers, notaries public, civil servants. A youth fresh from the university (as was the petitioner [R. 357]) may even have *expressed* abstract beliefs calling for the change of existing American institutions.[22]

If the doctrine of this case is permitted to stand, a person's professional status or position may be infused with insecurity, subject to a potential adjudication that years before he took a false oath. The oath may be held false because views were expressed of political beliefs which some displeased official has later concluded are inconsistent with a pledge to support the Constitution. Or what is infinitely worse, upon the doctrine of this case, the views need not be expressed at all—falsity may be attributed from association with a party and from a selection of interpretations of party doctrine that do not represent the views of the affiant.

THIRD

The finding that there was a fraudulent concealment at the time of naturalization of petitioner's membership in the Communist Party is without support in the evidence.

The Court has found (R. 50) that the "decree and certificate of naturalization were fraudulently procured and obtained" in that respondent concealed from the naturalization court that he was a member of the Communist Party. The finding continues (R. 50) that the naturalization court was deceived in that the principles of the Communist Party are opposed to the principles of the Constitution, and advised, advocated and taught (a) the overthrow of the government, Constitution, and laws of the United States by force and violence; and (b) taught disbelief in, and opposition to, organized government.

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[22]See statement of Mr. Justice Brandeis in the *Whitney* case, *supra*, p. 19.

1 There was no concealment.

The form of the petition is prescribed by statute (8 U. S. C. § 409). The petition in this case follows the official form (R. 74). Paragraph "Eighth" of this form reads as follows: "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist, or a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ——, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States."

The official form required the negativing only of political opinions or membership in any organization teaching disbelief in organized government, which the Department of Labor seemed to construe as meaning any anarchist organization.[3]

The naturalization laws and the regulations of the Department of Labor then in force were contained in a pamphlet entitled "Naturalization Laws and Regulations, June 15, 1924." Petitioner may have read this pamphlet (which was given without charge to the Communist Party or any interest on the part of the

court in Communism, or in any association with a party that believed in the overthrow by force or violence of the government of the United States, or all forms of law. There was not then, as there is now, a provision preventing the naturalization of a person "who believes in, advises, advocates or teaches, or who is a member of or affiliated with an organization, association, society, or group that believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government of the United States or of all forms of law." That was added by the Act of October 14, 1940, 4 U. S. C. 736.

2. There was no fraud.

If, despite the apparent lack of interest of the Government at that time, any basis can be made for asserting that the petitioner should have written this information into a form that contained no provision for it, or should somehow have managed to get this information before the court though there was no indication that the court asked any question about it,—there is not the slightest evidence to prove that the failure to do so was willful or fraudulent. He had no reason to believe that the court was interested in the Communist Party or in any party that was standing for the anarchistic idea of opposition to all organized government.

In this finding on concealment it is enough not to upset the finding of the trial court unless the statement that the Communist Party "might likewise" oppose organized government is true. The Government's attorney at the time went so far as to state that an "order of the day" by the petitioner was a declaration of opposition to organized government. If there is not a modicum of evidence to support the petitioner testified to the contrary, it [illegible] finding of concealment by the record of the [illegible]

against the Communist Party, for the very reason that the Communist Party was not opposed to organized government.[24]

Nor was the situation changed so far as petitioner was concerned by the fact that there was in effect in 1927 the Act of October 16, 1918 as amended by the Act of June 5, 1920 (8 U. S. C. § 137).[25] For if petitioner knew about these statutes—they were not included in the pamphlet on naturalization published by the Labor Department—he had no reason to suppose they applied to him. For they were deportation and exclusion statutes; he had lived here practically all his life. They referred to organizations believing in force and violence; he did not so construe the tenets of the Communist Party.

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[24]Report No. 1023 by Mr. Starnes for the Committee on Immigration and Naturalization, to accompany H. R. No. 7120, 74th Congress, 1st sess., May 27, 1935, states:

> "The acts above cited, of 1918 and 1920 centered around the anarchist idea of 'opposition to all organized government'. On that basis alone Communist or Fascist aliens differ in that while they may be imbued with 'opposition to non-Communist governments or opposed to non-Fascist governments' they are not 'opposed to all organized government.' This decided differentiation of the subversive activities dominating 'anarchists, Communists, and Fascists' renders necessary the enactment by Congress of a bill of this character in order to enable our Immigration and Naturalization Service to have a statute to guide them in handling the cases of Communists and Fascists."

[25]Under these Acts (referred to in the preceding footnote) aliens were to be *excluded* from admission into the United States and provision was made for their *deportation* if, among other things, they were "affiliated with any organization, association, society or group that believes in, advises, advocates or teaches (1) the overthrow by force or violence of the Government of the United States or of all forms of law. * * *"

FOURTH

The finding that petitioner did not behave as a person attached to the principles of the Constitution and well disposed to the good order and happiness of the United States cannot be supported.

The court found (R. 49) that petitioner "had not behaved as a man attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same"; but was a member of the Communist Party, the principles of which were opposed to the principles of the Constitution; and advised, advocated and taught the overthrow of the government, the Constitution and laws of the United States by force and violence; taught disbelief in and opposition to organized government (R. 49).

We have referred (*supra*, p. 9) to petitioner's impeccable life and behavior. The evidence which the Government believes sustains this finding may be stated in the language of the Government's brief in the Circuit Court of Appeals (pp. 18-19). "Appellant's admitted advocacy of the Communist's tenets and objectives and his active participation in the activities of the Communist organizations was clearly conduct inconsistent with that of a person attached to our form of government."

We submit that the argument cannot be sustained.

1. Membership in the Communist Party is not a basis for exclusion or deportation, and is relevant in these proceedings only as a ground for imputing certain abstract ideas to petitioner. But the possession of abstract political

ideas, without external acts, cannot be said to come within the comprehension of the word "*behavior*".[26]

2. But if the holding or even the advocacy of abstract ideas can be held to constitute "behavior", certainly the holding of abstract ideas—calling for a long range program of change—ideas that are not proscribed by any definite statute, that do not constitute an incitement to action, that do not advocate the overthrow of the government by force or violence: cannot in and of itself constitute "behavior" within the meaning of the naturalization statute. It is not to be assumed that young men attending a university, as petitioner was at the time he applied for citizenship (R. 359), will be free from the ferment of ideas. Nor that they will escape the belief that certain changes in our economic, political and social set-up would be desirable. But a man may be concerned about the United States—may be devoted to his country and still firmly believe that there must be change. And no one can say that such a position, without more, indicates a lack of attachment to the principles of the Constitution. *United States* v. *Rorin*, 12 F. 2d 942, at 944-5; dissenting opinion of Holmes, J., in *United States* v. *Schwimmer*, 279 U. S. 644, 654-655[27] and see *supra*, page 19.

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[26]"Behavior" is defined by the Oxford Dictionary (Murray Ed., Vol. I, Part II, p. 772) as the "manner of conducting oneself in the external relations of life: demeanor, deportment, bearing, manners" The Century Dictionary (1911 Ed., p. 508), in discriminating "behavior" from "conduct", states: "*Behavior* is the most general expression of one's mode of acting: it also refers particularly to comparatively conspicuous actions and conduct. *Conduct* is more applicable to actions viewed as connected into a course of life, especially to actions considered with reference to morality."

[27]"Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. * * * Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be."

3. If "behavior" indicating a lack of attachment to the Constitution can be predicated merely upon the holding of ideas approving social and political change, certainly such ideas must be proved by what the man himself has said or done or advocated, or by other irrefutable evidence. They may not be imputed solely on his connection with an organization and an interpretation of the tenets of that organization gathered from various writings, for not all men believe alike as to the doctrines of a political party, even when those doctrines have been condensed into a party platform.

4. Even if in the naturalization court purely abstract ideas could be considered as "behavior" and doubts as to their American quality could exclude a man of blameless life from American citizenship, such "behavior" cannot constitute a cause for revocation in the absence of a showing that the nature and qualities of those beliefs have been misrepresented to the court and that, as we have seen, has not been shown here.

CONCLUSION.

The dangers in the doctrine, implicit in the decision below—the jeopardy to naturalized citizens whose lives may be uprooted by imputed ideologies; the hazard to citizens, native and naturalized alike, whose constitutional oaths may later be called into question by persons who may impute to them ideas differing from those of the majority—make it imperative that the decision below be examined by this Court.

This Court in the exercise of its supervisory power should grant a writ of certiorari to review and revise the decision of the Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted

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